Sino Pac Development (Thailand) Ltd v Patrick Yap Huan Ju

HIGH COURT (SHAH ALAM) — SUIT NO 22-201 OF 1994
FAIZA TAMBY CHIK J
28 AUGUST 1997

Civil Procedure *— Jurisdiction — High Court — Civil jurisdiction of the High Court — Defendant was a Malaysian citizen working in Malaysia and also a permanent resident of Canada — Transaction in dispute had occurred entirely in Thailand — Whether defendant is a resident or has his place of business within the local jurisdiction of the court — Whether action is to be heard in Malaysia — Courts of Judicature Act 1964 s 23(1)(b)*

Civil Procedure *— Stay of proceedings — Forum conveniens — Whether action ought to be stayed on the ground that the Malaysian courts were not the appropriate forum to hear the action based on the doctrine of forum non conveniens — Whether there was some other available forum which prima facie was clearly more appropriate for the trial of the action*

The defendant, a Malaysian citizen working in Malaysia and also a permanent resident of Canada, had agreed to purchase shares in a company duly registered and incorporated in Thailand. The defendant had agreed to execute a blank share transfer form to be retained by the plaintiff, also a company incorporated in Thailand, pending repayment of a loan given to the former for the purchase of the shares. The defendant failed to execute the blank transfer share form. The plaintiff challenged the defendant to submit to the jurisdiction of the Thai courts but the defendant had refused. The plaintiff then filed an action against the defendant in Malaysia. The defendant applied to set aside the plaintiff's writ on the ground that the court has no jurisdiction to hear the action. Alternatively, the defendant applied that the action be stayed until further order of the court. The learned senior assistant registrar ('the SAR') struck out the writ. The plaintiff appealed. Counsel for the defendant submitted that the defendant was a permanent resident of Canada and, therefore, the action should be commenced in Canada. The issues before the court were, inter alia: (i) whether, by virtue of s 23(1)(b) of the Courts of Judicature Act 1964 ('the CJA'), the court has jurisdiction to hear the action; and (ii) whether the action ought to be stayed on the ground that the Malaysian courts were not the appropriate forum to hear the action based on the doctrine of forum non conveniens.

Held, setting aside the SAR's decision, reinstating the writ and staying the order until further order of the court:

(1) The purpose of a person's stay in a particular country is relevant in considering whether he resides in the country or not. The word 'resides' as contained in s 23(1)(b) of the CJA denotes a degree of permanence. The fact that the defendant was a

Malaysian citizen, however, was not relevant. In this case, the defendant's stay in this country was not permanent and only temporary. On the other hand, the defendant was a Malaysian currently employed in Malaysia and had been living in Malaysia since the commencement of the action which in itself could be construed to mean that he had a place of business in Malaysia within the scope of s 23(1)(b) of the CJA (see pp 58H–I and 59A–E); *Commissioners of Inland Revenue v Zorab* (1926–27) Vol XI Pt IV TC 289, *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101, *Re Bhagwan Singh, Decd* [1964] MLJ 360, *Willis v Willis* [1941] MLJ 169 and *Haji Abdul Ghani bin Ishak v PP* [1981] 2 MLJ 230 followed.

(2) It is accepted that a defendant to a suit may apply to a court to stay the action on the ground that the court is not the appropriate forum to hear the matter, ie based on the doctrine of forum non conveniens.

Where an application by a defendant for stay of proceedings is concerned, in applying the doctrine, the defendant would have to satisfy the court that some other forum was more appropriate. If the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden would then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country. If, however, the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it would ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court would consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. On this inquiry, the burden of proof shifts to the plaintiff.

In this case, on the facts, the natural or appropriate forum would be Thailand. The plaintiff had not contended nor shown that they would be denied any form of relief or that they would not get a fair trial in Thailand if the trial of the matter is conducted in Thailand. Therefore, quite clearly, the plaintiff would not be denied any advantage by conducting a trial in Thailand. Therefore, there was some other available forum which prima facie was clearly more appropriate for the trial of the action. In the circumstances, the decision of the learned SAR was set aside. Accordingly, the writ was reinstated forthwith and the action stayed until further order of the court (see pp 61E, 62I, 63D–G, I and 64A–B); *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160, *Spiliada Maritime Corp v Cansulex Ltd The Spiliada* [1986] 3 All ER 843 and *The Abidin Daver* [1984] 1 All ER 470; [1984] AC 398 followed

Per curiam:

An appeal from the SAR to a judge in chambers would be by way of rehearing, as though the matter has come before the latter for the first time. The judge is therefore not confined to the points taken before the registrar so that the rule about new points being not generally open to an appellant to take on appeal does not apply. In the present case, therefore, it is open for the court to consider the issue whether the action should be stayed on the grounds that the Malaysian courts are not the appropriate forum to hear the action based on the doctrine of forum non conveniens (see pp 60H–I and 61A–E); *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 followed.

[**Bahasa Malaysia summary**

Defendan, seorang warganegara Malaysia yang bekerja di Malaysia dan juga seorang penetap Kanada, telah bersetuju membeli saham dalam sebuah syarikat yang didaftarkan dan ditubuhkan di negeri Thai. Defendan telah bersetuju melaksanakan suatu borang pindahmilik saham yang kosong untuk disimpan oleh plaintif, juga sebuah syarikat yang ditubuhkan di negeri Thai, sementara menunggu bayaran balik pinjaman yang diberikan kepada defendan untuk belian saham-saham. Defendan telah gagal melaksanakan borang pindahmilik saham yang kosong. Plaintif mencabar defendan supaya menyerah kepada bidang kuasa mahkamah negeri Thai tetapi defendan enggan berbuat demikian. Plaintif kemudiannya memfailkan suatu tindakan terhadap defendan di Malaysia. Defendan memohon untuk mengetepikan writ plaintif berdasarkan alasan bahawa mahkamah tidak berkuasa untuk membicarakan tindakan. Secara alternatif, defendan memohon supaya tindakan digantung sehingga perintah lanjut mahkamah. Penolong kanan pendaftar ('PKP') yang bijaksana membatalkan writ itu. Plaintif merayu. Peguam defendan menghujahkan bahawa defendan adalah permanent resident Kanada dan maka tindakan harus dimulakan di Kanada. Isu-isu di hadapan mahkamah adalah, antara lain, sama ada: (i) disebabkan s 23(1)(b) Akta Mahkamah Kehakiman 1964 ('AMK'), mahkamah mempunyai bidang kuasa untuk membicarakan tindakan; dan (ii) tindakan harus digantung atas alasan bahawa mahkamah Malaysia bukanlah forum yang wajar untuk membicarakan tindakan berdasarkan doktrin forum non conveniens.

Diputuskan, mengetepikan keputusan PKP, mengembalikan writ kepada yang asal dan menggantung perintah sehingga notis lanjut mahkamah:

(1) Tujuan penginapan seseorang di negara tertentu adalah relevan dalam mempertimbangkan sama ada dia tinggal di negara itu atau tidak. Perkataan 'tinggal' seperti yang terkandung dalam s 23(1)(b) AMK menandakan darjah ketetapan. Namun demikian, fakta bahawa defendan adalah warganegara Malaysia

adalah tidak relevan. Dalam kes ini, penginapan defendan di negara ini tidak tetap dan hanya sementara. Sebaliknya, defendan adalah seorang rakyat Malaysia yang kini bekerja di Malaysia dan telah tinggal di Malaysia sejak permulaan tindakan yang dengan sendirinya boleh ditafsirkan sebagai bermakna bahawa dia mempunyai tempat perniagaan di Malaysia dalam lingkungan skop s 23(1)(b) AMK(lihat ms 58H–I dan 59A–E); *Commissioners of Inland Revenue v Zorab* (1926–27) Vol XI Pt IV TC 289, *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101, *Re Bhagwan Singh, Decd* [1964] MLJ 360, *Willis v Willis* [1941] MLJ 169 dan *Haji Abdul Ghani bin Ishak v PP* [1981] 2 MLJ 230 diikut.

(2) Adalah diterima bahawa defendan dalam sesuatu guaman boleh memohon kepada mahkamah supaya menggantung tindakan atas alasan bahawa mahkamah itu bukanlah forum yang wajar untuk membicarakan perkara itu, iaitu berdasarkan doktrin forum non conveniens.

Di mana sesuatu permohonan oleh defendan untuk penggantungan adalah berkaitan, dalam memakai doktrin, defendan haruslah memuaskan mahkamah bahawa forum lain adalah lebih wajar. Jika mahkamah adalah puas bahawa terdapat forum lain yang prima facie adalah forum yang wajar bagi perbicaraan tindakan, beban kemudiannya akan mengalih kepada plaintif untuk menunjukkan bahawa terdapat keadaan khusus lain yang mana demi keperluan keadilan perbicaraan dikehendaki dijalankan di negara ini. Namun demikian, jika mahkamah memutuskan di tahap itu bahawa terdapat forum lain yang prima facie adalah lebih wajar untuk perbicaraan tindakan, biasanya ia akan membenarkan penggantungan melainkan terdapat keadaan-keadaan yang mana atas keperluan keadilan penggantungan tidak harus dibenarkan. Dalam siasatan ini, mahkamah akan mempertimbangkan kesemua keadaan kes, termasuk keadaan yang melampaui keadaan yang diambil kira ketika mempertimbangkan faktor-faktor berkaitan dengan bidang kuasa lain. Pada siasatan ini, beban membukti mengalih kepada plaintif.

Dalam kes ini, atas fakta-fakta, forum yang wajar adalah negeri Thai. Plaintif tidak menghujahkan atau menunjukkan bahawa mereka akan dinafikan sebarang bentuk relief atau bahawa mereka tidak akan mendapat perbicaraan yang adil di negeri Thai sekiranya perkara ini dijalankan di sana. Dengan itu, amat jelas plaintif tidak akan dinafikan sebarang kelebihan sekiranya perbicaraan dijalankan di negeri Thai. Maka prima facie terdapat forum lain yang lebih wajar untuk perbicaraan tindakan. Dalam keadaan ini, keputusan PKP yang bijaksana diketepikan. Dengan itu, writ dikembalikan dengan serta merta dan tindakan digantung sehingga perintah lanjut mahkamah (lihat ms 61E, 62I, 63D–G, I dan 64A–B); *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160, *Spiliada Maritime Corp v*

Cansulex Ltd The Spiliada [1986] 3 All ER 843 dan *The Abidin Daver* [1984] 1 All ER 470; [1984] AC 398 diikut. A

Per curiam:

Suatu rayuan daripada PKP kepada hakim dalam kamar adalah secara pembicaraan semula, seolah-olah perkara dibicarakan oleh mahkamah buat kali pertama. Oleh itu hakim tidak terbatas kepada hujah yang diambil di hadapan pendaftar supaya rukun tentang hujah baru biasanya tidak terbuka kepada perayu untuk membuat rayuan tidak terpakai. Dalam kes ini, dengan itu adalah terbuka kepada mahkamah untuk mempertimbangkan isu sama ada tindakan harus digantung atas alasan bahawa mahkamah Malaysia bukanlah forum yang wajar untuk membicarakan tindakan berdasarkan doktrin forum non conveniens (lihat ms 60H–I dan 61A–E); *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 diikut.] B C D

Notes

For cases on the jurisdiction of the High Court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2151–2173.

For cases on forum conveniens, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3148–3150. E

Cases referred to

Abidin Daver, The [1984] 1 All ER 470; [1984] AC 398 (folld)

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160 (folld) F

Bhagwan Singh Decd, Re [1964] MLJ 360 (folld)

Commissioners of Inland Revenue v Zorab (1926–27) Vol XI Pt IV TC 289 (folld)

Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor [1979] 2 MLJ 101 (folld)

Haji Abdul Ghani bin Ishak v PP [1981] 2 MLJ 230 (folld) G

Kai Tai Timber Co Ltd Hong Kong v Inter Maritime Management Sdn Bhd [1994] 3 AMR 2444 (refd)

Spiliada Maritime Corp v Cansulex Ltd (The Spiliada) [1986] 3 All ER 843 (folld)

Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (folld) H

Willis v Willis [1941] MLJ 169 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 23(1), (1)(b) I

J Appukuttan (*Kitson Foong & Associates*) for the plaintiff.
FH Lim (*Wong Kuo Shing & Co*) for the defendant.

Faiza Tamby Chik J: This is an appeal by the plaintiff (in encl 24) against the decision of the senior assistant registrar ('SAR') dated 27 July 1995 whereby she allowed prayer 1B of encl 21 with costs. Enclosure 21 is an amended summons in chambers by the defendant dated 28 November 1994 to set aside the writ pursuant to s 23(1) of the Courts of Judicature Act 1964 ('the CJA') on the ground that the court has no jurisdiction to hear the action. The defendant there, in fact, applied for and prayed in the alternative that:

(1A) the writ be set aside without liberty to file afresh;

(1B) the writ be struck off and this proceeding be dismissed with costs; and

(1C) this action be stayed until further order of this court.

Facts of the case

The defendant had agreed to purchase 15,000 shares in one Aspac Construction Ltd, a company duly registered and incorporated in Thailand ('the shares'). The plaintiff agreed to loan the sum of Thai baht one million five hundred thousand (B1.5m) to purchase the shares ('the loan'). The terms and conditions of the loan were that, inter alia:

(i) the defendant was to pay interest at the rate of 7.5% per annum; and

(ii) the defendant was to execute a blank share transfer form to be retained by the plaintiff pending repayment of the loan.

On or about 12 January 1993, the shares were issued in favour of the defendant (see exh TH-3 in encl 4). The plaintiff then requested the defendant to execute the blank share transfer form of the shares but the defendant refused to do the same (see exh TH-4 encl 4). The plaintiff then demanded the repayment of the loan and, despite the demand, the plaintiff had failed, refused and/or neglected to pay the same (see exh TH-5 encl 4). The defendant does not dispute that the plaintiff had paid for the shares, instead he claims that it was a gift from the plaintiff. It is not disputed that the entire transaction had occurred in Thailand. The plaintiff is without a remedy since there is no reciprocal enforcement of judgment between Malaysia and Thailand (see exh TH-9 encl 4). The plaintiff had challenged the defendant to submit to the jurisdiction of the Thai courts but the defendant had refused the same (see para 13(i) of encl 4).

It is to be noted at the outset that the defendant has raised no defence to this action apart from alleging that the loan was a gift without any evidence to support the same. The defendant's challenge to the jurisdiction of this court is twofold:

(i) the defendant is a permanent resident of Canada and the action should be commenced there; and

(ii) there is a pending action between the defendant and one Sino Pac International Investment Inc in Canada and the action therefore should be heard in Canada.

Section 23(1)(b) of the CJA reads as follows:

> Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —
>
> ...;
>
> (b) the defendant or one of several defendants resides or has his place of business; ...,
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> within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

The defendant contended that he has not been ordinarily resident in Malaysia since 1979 and has been residing in various places including Brunei, Hong Kong, Singapore, Canada, United States of America and Thailand. He also contended that his residence in Malaysia is temporary and his length of stay is uncertain. He also contended that he does not own any property nor assets in Malaysia; all his assets are in Canada. Furthermore, he contended that he had, since March 1990, emigrated to Canada and is a permanent resident of Canada. He contended that his two children are also in Vancouver, Canada (see paras 3–6 of encl 6 and the defendant's affidavit dated 10 March 1997).

In *Commissioners of Inland Revenue v Zorab* (1926–27) Vol XI Pt IV TC 289 at p 291 Rowlatt J said, inter alia:

> Of course, it is perfectly right to say that a man has not got to have a residence in the shape of a building to be resident in this country. That is quite clear. But I think that one has to consider not only the time that he is in this country, but the nature of his visit and his connection with the country. I think the cases quite bear that out. Because the question to be solved is not whether he is resident for the five months he is here, but whether he is resident for the whole year during the time he is not there. So I think we must consider the nature of his connection with this country in every case.

In *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 at p 107, the Federal Court stated:

> The *Oxford English Dictionary* defines the word 'reside' to mean 'to dwell permanently or for a considerable time to have one's settled or usual abode, to live in or at a particular place'.

The above cases show that the purpose of a person's stay in a particular country is relevant in considering whether he resides in the country or not. Further, the word 'resides' as contained in s 23(1)(b) of the CJA denotes a degree of permanence as stated in *Syed Kechik*'s case. Here, the defendant's stay in this country is not permanent and is only temporary as he has continuously stated in his affidavits filed herein. The defendant is a permanent resident of Canada and has always maintained that he would return there.

Further, the fact that the defendant is a Malaysian citizen is not relevant in deciding whether he 'resides' here within s 23(1)(b). See the case of *Re Bhagwan Singh, Decd* [1964] MLJ 360 at p 363:

A It has been stated by the applicant in his affidavit that the deceased at the time of his death was a British subject, but this fact merely determines the political status or nationality of the deceased. Nationality and domicile are two different conceptions and a man may change his domicile without divesting himself of his nationality (see *Boldrini v Boldrini and Martini* [1932] P 9 at p 15).

B To the defendant's allegation that he is a permanent resident of Canada, this does not in itself mean that he 'resides' in Canada within the meaning of s 23(1)(a) of the CJA by virtue of the fact that the defendant's permanent residency has been extended time and time again and is due to expire on 28 August 1998 (see exh PYHJ-10, affidavit of the defendant affirmed on C 10 March 1997). More importantly, since the commencement of this action, the defendant has been residing in Malaysia.

'Reside' has been defined in *Willis v Willis* [1941] MLJ 169 at p 172 as 'the place where an individual eats, drinks and sleeps or where his family or his servants eat, drink and sleep'.

D In any event, the defendant is a Malaysian currently employed in Malaysia and has been living in Malaysia since the commencement of this action (see exh PYHJ-8 in encl 19) which in itself can be construed to mean that he has a 'place of business' in this country within the meaning of s 23(1)(b) of the CJA.

E 'Business' has been defined as:

> ... any particular occupation or employment habitually engaged in especially for livelihood or gain but it is a word of large and indefinite import and includes anything which occupies the time attention and labour of a man for the purpose of profit ... and the word means almost anything which is an occupation or duty requiring attention ... (see *Words and Phrases Judicially* F *Defined* (1990) Malayan Law Journal Sdn Bhd at p 75).

Business has also been defined in *Haji Abdul Ghani bin Ishak & Anor v PP* [1981] 2 MLJ 230 at p 237 as follows:

> In *Smith v Anderson* 15 Ch D 247 at p 258, Jessel MR said 'anything which occupied the time and attention and labour of a man, for the purpose of G profit, is business'. According to 38 *Halsbury's Laws of England* (3rd Ed) at p 11, 'business' is a wider term than, and not synonymous with, trade; and means practically anything which is an occupation as distinguished from a pleasure. Profit or the intention to make profit is not an essential part of the legal definition of a trade or business ... . Again in *Rolls v Miller* (1884) 27 Ch D 71 at p 88, Lindley LJ said: H
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> > 'The word "business" means almost anything which is an occupation, as distinguished from a pleasure — anything which is an occupation or duty which requires attention is a business.'

Further, it is trite law that factors to be considered in determining if the action is to be heard is to be heard in Malaysia include: I

(i) the fact that the defendant is currently residing in Malaysia;

(ii) the proximity between Malaysia and Thailand that would render it most convenient to have the matter disposed here and it would be

cheaper to transport the witnesses from Thailand to Malaysia than to Canada;

(iii) whether all documentary evidence is readily available in Malaysia;

(iv) whether the plaintiff would have difficulty enforcing the judgment if obtained in Thailand; and

(v) the fact that there is no reciprocal enforcement of judgment between Canada and Malaysia and the defendant has refused to submit to the jurisdiction of the Thai court; and more importantly, any judgment obtained by the plaintiff in Thailand cannot be enforced in Malaysia: see *Kai Tai Timber Co Ltd Hong Kong v Inter Maritime Management Sdn Bhd* [1994] 3 AMR 2444.

With respect to the defendant's allegation that there is a pending suit in Canada, it appears that the suit has been commenced by the defendant with respect to some alleged employment dispute (see the statement of claim in encl 6 exh PYHJ-2) with a party who is not the plaintiff herein. The plaintiff has no affiliation with the defendant in the Canadian suit (see exh TH-6 encl 4).

In *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160 at p 166, the (then) Supreme Court stated:

> ... it is most important to bear in mind another vital principle, that, even if there is such jurisdiction to deal with the case, at common law, a Malaysian court has still the discretion to decide whether to deal with it on the doctrine of forum non conveniens. If the court exercises its discretion accordingly, eg not to deal with the case, then as the case may be, it can either stay the proceedings against the foreign defendant or refuse to grant leave to issue and serve out of jurisdiction such a notice of writ of summons, or permit an application to set aside such leave when leave has already been granted in the absence of the foreign defendant in an ex parte application for such leave earlier.

The learned SAR, upon hearing the defendant's application in encl 21, decided to allow the application by granting prayer (1B) of the application, ie striking out the writ and dismissing the suit (see order dated 27 July 1995 encl 28). Nevertheless, the defendant in its application in encl 21 had applied in the alternative to stay this action until further order of this court (prayer (1C), encl 21).

As this is an appeal from the SAR to a judge in chambers, this matter would be by way of rehearing, as though the matter has come before me for the first time. In *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at pp 36–37, the Federal Court stated:

> ... in appeals to a judge in chambers from the decision of a registrar of the High Court, the judge is not exercising appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the subordinate courts. Such appeals from decisions of the registrar are by way of an actual rehearing and the judge treats the matter as though it comes before him for the first time. The judge is therefore not confined to the points taken before the registrar so that the rule about new points being not generally open to an appellant to take on appeal does not apply. In support,

A we would refer to the following passage in the judgment of Payne J in *Blundell v Rimmer* [1971] 1 All ER 1072 at p 1076; [1971] 1 WLR 123 at pp 127–128:

> 'I understand that the arguments before me ranged over a wider ground than those advanced by the parties' solicitors to the district registrar, and it was contended by counsel for the plaintiff that I was fettered by the proceedings before the district registrar and confined to the arguments which were presented to him — that no point could be raised before me which was not raised below. It is, I think, clear on authority that the appeal from the district registrar is a rehearing of the application and I am entitled to treat the matter as though it had come before me for the first time, and, moreover, that I am not fettered by the previous exercise of the district registrar's discretion, although I should, of course, give to it the weight which it deserves. Authority for this proposition can be found in the speech of Lord Atkin in *Evans v Bartlam* [1937] AC 473 at p 478 and in the notes in 1 *Supreme Court Practice* (1970) at p 759 para 58/1/2, p 762 para 58/4/1, under RSC O 58 rr 1 and 4.'

D It is therefore open for me to consider this issue as to whether this action should be stayed on the ground that the Malaysian courts are not the appropriate forum to hear this action based on the doctrine of forum non conveniens.

E The doctrine of forum non conveniens has received judicial acceptance in our courts and it is accepted that a defendant to a suit may apply to a court to stay the action on the ground that this court is not the appropriate forum and there exists another more appropriate forum to hear the matter.

In *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160 at p 167, the Supreme Court stated:

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> The doctrine of forum non conveniens appears to have originated in Scotland and has finally found full acceptance by the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] AC 460; [1986] 3 All ER 843; [1986] 3 WLR 972 after a series of decisions, as described and set out so well in that very interesting and readable joint article by RH Hickling and Wu Min Aun, 'Stay of Actions and Forum Non Conveniens' [1994] 3 MLJ xcvii.

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> The main judgment in *The Spiliada* was delivered by Lord Goff, who adopted the dictum of Lord Kinnear in *Sim v F Robinow* (1892) 19 R (Ct of Sess) 665 at p 668 being the fundamental principle in regard to this doctrine, ie that 'there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice'. Lord Goff cautioned that the word 'conveniens' in forum non conveniens meant suitability or appropriateness of the relevant jurisdiction and not one of convenience. We are in entire agreement with the fundamental principle so expressed.

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> In our view, where an application by a defendant for stay of proceedings is concerned, in applying the said doctrine, the defendant would have to satisfy the court that 'some other forum is more appropriate', per Lord Templeman in *The Spiliada*. Where, on the other hand, leave to issue and serve out of jurisdiction a notice of writ of summons under O 11 r 1 of the RHC is involved, then according to the reasoning of Lord Templeman, the

plaintiff (not the defendant, be it noted) would have to satisfy a Malaysian court that, by comparison, that Malaysian court is the most appropriate forum to try the action. Thus, it will be seen that in the instant case, the burden lay on the bank customers, the plaintiffs, to satisfy the High Court below that Malaysia was the most appropriate forum. A

Having regard to the reasoning of the learned Law Lords in *The Spiliada* and the learned joint article aforesaid, we are of the considered view that in all cases of either a defendant's application for stay of proceedings or a plaintiff's application for leave to serve out of jurisdiction under O 11 r 1 of the RHC, or for setting aside such leave, it will be obligatory for a Malaysian court to consider in any event, a most important factor, ie whether 'it would be unjust to the plaintiff to confine him to remedies elsewhere'. It is indispensable when a Malaysia court considers all cases in connection with forum non conveniens. B C

In *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* the House of Lords held (see [1986] 3 All ER 843 at p 844):

(1) The fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the appropriate forum and also the grant of leave to serve proceedings out of the jurisdiction was that the court would choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice (see pp 846 c–d, 847a–c, 853d–e and 854j, post); dictum of Lord Kinnear in *Sim v Robinow* (1892) 19R (Ct of Sess) 665 applied; *Societe du Gaz de Paris v SA de Navigation 'Les Armateurs Francais'* 1926 SC (HL) 13 considered. D E

(2) In the case of an application for a stay of English proceedings, the burden of proof lay on the defendant to show that the court should exercise its discretion to grant a stay. Moreover, the defendant was required to show not merely that England was not the natural or appropriate forum for the trial but that there was another available forum which was clearly or distinctly more appropriate than the English forum. In considering whether there was another forum which was more appropriate, the court would look for that forum with which the action has the most real and substantial connection, eg in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction and the places where the parties resided or carried on business. If the court concluded that there was no other available forum which was more appropriate than the English court, it would normally refuse a stay. If, however, the court concluded that there was another forum which was prima facie more appropriate, the court would normally grant a stay unless there were circumstances militating against a stay, eg if the plaintiff would not obtain justice in the foreign jurisdiction (see pp 846c–d, 847a–c, 854j, 855hj and 856a–e, post); *Societe du Gaz de Paris v SA de Navigation 'Les Armateurs Francais'* 1926 SC (HL) 13, *The Atlantic Star* [1973] 2 All ER 175, *MacShannon v Rockware Glass Ltd* [1978] 1 All ER 625 and *The Abidin Daver* [1984] 1 All ER 470 considered. F G H I

Applying the above principles to the facts in this case, the natural or appropriate forum for this case is Thailand:

The facts in this case:

(1) The plaintiff's claim against the defendant is that between January and March 1991, the plaintiff assisted the defendant in acquiring 15,000 shares in a company called Aspac Construction Ltd ('Aspac'). This alleged transaction, which is denied, would have taken place in Thailand.

(2) The plaintiff is a company incorporated in Thailand.

(3) Aspac, the company whose shares are the subject matter of this claim, is a company incorporated in Thailand (see para 17, encl 6).

(4) These facts are not denied by the plaintiff.

(5) The plaintiff has not produced any documents evidencing this transaction in the form of any written agreement or contract. This means that it is imperative that witnesses are called to testify to the existence or otherwise of this alleged transaction. All witnesses, with the exception of the defendant, are in Thailand.

Accordingly, it can be seen from the case of *Spiliada Maritime v Cansulex Ltd* that if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country. If, however, the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction: see *The Abidin Daver* [1984] 1 All ER 470 at p 476; [1984] AC 398 at p 411, per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff.

The question as to whether it would be unjust for the plaintiff to be confined to seek his relief at the other forum, the plaintiff in the instant case has not — in the affidavits filed with respect to this application — shown or contended that they would be losing an advantage or that it would be unjust to conduct a trial in Thailand with the excepting of the contention that a judgment obtained in Thailand would be a 'paper judgment' as the defendant has no assets in Thailand. This argument is misconceived as any judgment obtained in Malaysia may not be enforced here as the defendant has no assets in Malaysia as all his assets are in Canada. This fact has not been contradicted by the plaintiff.

In this context, the plaintiff has not contended nor shown that they would be denied any form of relief or that they would not get a fair trial in Thailand if the trial of this matter is conducted in Thailand. Therefore, quite clearly, the plaintiff will not be denied any advantage by conducting a trial in Thailand.

In these circumstances, this court has come to the conclusion that there is some other available forum which prima facie is clearly more appropriate for the trial of this action. Therefore, the decision of the learned SAR on 27 July 1995 is hereby set aside. The writ dated 28 April 1994 is hereby reinstated forthwith. This action is hereby stayed until further order of this court.

Order accordingly.

Reported by Hanim Kamaruddin